

IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

United States of America,  
Plaintiff

vs

Mary Beth Harshbarger,  
Defendant

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5:08-MJ-00109

BEFORE: U.S. Magistrate Malachy E. Mannion

PLACE: Wilkes-Barre, Pennsylvania

PROCEEDINGS: Hearing on the Request for  
Extradition

DATE: Friday, February 13, 2009

APPEARANCES:

For the United States:

Christian A. Fisanick  
U.S. Attorney's Office  
235 N. Washington Avenue  
Scranton, PA 18501-0309

For the Defendant:

Paul P. Ackourey, Esq.  
Law Offices of Paul P. Ackourey  
116 N. Washington Avenue  
Suite 1-G  
Scranton, PA 18503

1 (11:06 a.m., convene.)

2 MR. FISANICK: Good morning, your Honor.

3 MR. ACKOUREY: Good morning.

4 THE COURT: Okay. We're here on the matter of the  
5 United States on behalf of the Government of Canada in the  
6 matter of the extradition of Mary Beth Harshbarger. The  
7 criminal number in the case is 5:MJ-08-109. And we're here  
8 today for a hearing on the request for extradition by the  
9 government. Now, is the government ready to proceed?

10 MR. FISANICK: We are, your Honor.

11 THE COURT: And is the defense ready to proceed?

12 MR. ACKOUREY: We are, your Honor.

13 THE COURT: Okay. The burden is on the government, and  
14 you may proceed Mr. Fisanick.

15 MR. FISANICK: Your Honor, at this time we have filed of  
16 record the extradition documents from the sovereign nation of  
17 Canada, and we would introduce those as part of the record at  
18 this hearing. As stated in the government's prehearing  
19 brief, extradition hearings on behalf of a foreign government  
20 envision no live testimony, because as the United States  
21 Supreme Court has noted, it would be quite inconvenient to  
22 call detectives from foreign lands to the United States to  
23 testify in support of matters that are clearly within the  
24 paper of the diplomatic relations between the United States  
25 and Canada.

1       The case law also supports the fact that hearsay is  
2       admissible in an extradition hearing because the Federal  
3       Rules of Evidence, as well as the Federal Rules of Criminal  
4       Procedure do not apply to this proceeding. So this is sort  
5       of a sui generis proceeding at which time the government has  
6       to show six elements. So, if the Court would indulge me to  
7       make the argument now I can do it as part of the government's  
8       case or save it until the closing at the end of this hearing.

9       THE COURT: Let me do this, let's cover that issue,  
10      because I am going to go through each of the six elements,  
11      because I think most of the elements are not in dispute. It  
12      may be -- there's one element that's clearly in dispute. I'm  
13      not sure if there's a second element in dispute. Let me ask  
14      you, in your brief counsel, Mr. Ackourey, you argue that  
15      under Pennsylvania law the government is required to show a  
16      probable cause hearing by non-hearsay testimony.

17      MR. ACKOUREY: That's correct, your Honor.

18      THE COURT: And is that still your position?

19      MR. ACKOUREY: That is, and for that reason I would  
20      object to the government relying solely on hearsay testimony  
21      at this proceeding. And I believe that it's legally  
22      insufficient to argue the tenure of the treaty which governs  
23      what we do here today. It specifically says that in deciding  
24      that particular evidentiary issue, that it's the law of the  
25      place where the defendant is found that is controlling.

1 Specifically, it says Extradition shall be granted only if  
2 the evidence be found sufficient according to the laws in  
3 place where the person sought shall be found, either to  
4 justify his committal for trial of the offense of which he is  
5 accused has been committed in its territory or to prove that  
6 he is the identical person convicted by the courts of the  
7 requesting state.

8 And it's important, Judge, I think, that when you look  
9 at the language, where it says the law of the place found,  
10 that contrasts with what we see in Article 2 of the second  
11 protocol, where in deciding -- discussing issues concerning  
12 the Dual Criminality Doctrine the language is contracting  
13 parties, which I think clearly would be Canada and the United  
14 States in this instant. If there was a desire to change the  
15 language of Article 10 they could have used the terms  
16 contracting parties in an amendment to that protocol, but  
17 they didn't, they used the law where the defendant is found.  
18 And she was found in Pennsylvania.

19 As you know, the Middle District Court has ruled on this  
20 issue in Sylvester, at least to the extent that applied  
21 Pennsylvania law, specifically Commonwealth ex. rel. Buchanan  
22 v. Verbonitz, which is a Pennsylvania Supreme Court decision,  
23 in which an analysis was taken of evidence being introduced  
24 at a preliminary hearing to show probable cause or a prima  
25 facie case, and the court specifically said that the

1 individual's right to confront was violated under  
2 Pennsylvania law through the introduction of unsupported  
3 hearsay. The evidence that the government relies on here is  
4 not only hearsay, but it would be multiple levels of hearsay  
5 contained within the affidavits that have been submitted.  
6 And I would argue, Judge, that under Pennsylvania law -- I  
7 think it's blackmail law in Pennsylvania that something more  
8 than hearsay is required.

9 THE COURT: Well, let me ask you this, is it your belief  
10 then based upon the second protocol that that has somehow  
11 changed the fact that when -- or because it changed the words  
12 contracting, the contracting parties, meaning the United  
13 States and Canada, that that somehow doesn't make federal law  
14 the first step in deciding? I mean, isn't there significant  
15 circuit case law that tells us that the first place we look  
16 is to decide if there is a corollary in the United States's  
17 law since that is the one that is the party. If there's not  
18 a corollary in the United States law, then we would move on  
19 to a subordinate jurisdiction, in this case Pennsylvania.

20 MR. ACKOUREY: I think there's a dichotomy between what  
21 is to be applied in dual criminality. I mean, I would agree  
22 with you. I think it's clear from the second argument that  
23 dual criminality says we go to federal law first. We go to  
24 the law of the contracting parties. Consequently we're  
25 talking federal law. And only then would we go to state or

1 the plurality of states if there's no state law. But that's  
2 separate and distinct from the evidentiary question that is  
3 addressed by Article 10 in the treaty itself. The  
4 evidentiary question is what evidence is going to be  
5 considered competent evidence to determine whether or not  
6 probable cause has been established? And there it's clear,  
7 the treaty says the law of the place where she is found.

8 THE COURT: Let me ask you, I understand that you want  
9 to make it -- so, for example, if there's a separate law in  
10 Luzerne County, that would trump in your mind Pennsylvania's  
11 law, which would trump the United States's law because the  
12 more specific we get -- if she lives in Meshoppen, and  
13 they've got a local ordinance there, is it -- I'm trying to  
14 figure out how -- you seem to be going from -- we'll go from  
15 the largest entity down to the most specific, but isn't it  
16 exactly the opposite? Don't we look first in all treaties,  
17 since the state of Pennsylvania is not involved in this  
18 treaty at all?

19 MR. ACKOUREY: Right.

20 THE COURT: This is a treaty between the United States  
21 and Canada, and Pennsylvania is not involved in any way,  
22 shape or form of the treaty that was made with Canada, don't  
23 we always look to the United States laws first? And if  
24 they're not there, as you mentioned in the dual criminality  
25 aspect, we then begin to go in a step process going down to,

1 for example, what the state law would be. And if there was  
2 no applicable state law we would look to the majority of  
3 states in the United States, even though the defendant  
4 wouldn't have any connection perhaps with all the majority of  
5 the states.

6 MR. ACKOUREY: I understand where you're coming from,  
7 Judge. I'm just saying if you take a look at the language  
8 itself. How do we explain then the use of contracting  
9 parties, when it clearly means that we're talking about U.S.,  
10 Canada, as opposed to the language, the law of the place  
11 where the person sought shall be found? When if in fact they  
12 intended the contracting parties, isn't that what would have  
13 been said in the language?

14 THE COURT: Well, isn't it what was said, only in a  
15 different way? I mean, isn't it in fact the place where she  
16 was found was in the United States? I mean, is it not the  
17 United States that she was found in? I understand that you  
18 wish to make a difference, I can understand why you would  
19 wish to make a difference, but with that being said, let me  
20 take it a step further.

21 If we were to follow your argument on this, then what  
22 would be the basis of having such a treaty? I mean wouldn't  
23 we be then and isn't there adequate federal law that tells us  
24 that we're not to hold two trials, that it's not the purpose  
25 in any way, shape or form for the received state or, you

1 know, in this case the United States to hold a trial to  
2 determine whether the person did it, only then to send them  
3 back and decide a second time whether they did it. In other  
4 words, we're not to have a trial, and the whole purpose is  
5 not to be put in a position where the requesting state in  
6 international treaties is required to send over its evidence  
7 and witnesses and whatever for scrutiny under a foreign  
8 state's laws and have a trial. And the whole purpose of the  
9 treaties are in effect to avoid that by having the trial only  
10 occur in one place.

11 MR. ACKOUREY: Well, I don't think my interpretation or  
12 the application of Pennsylvania law in any way changes the  
13 burden that the government would have in establishing the --

14 THE COURT: Well, my point I guess is that under your  
15 theory in Pennsylvania law they'd have to call witnesses.

16 MR. ACKOUREY: Correct.

17 THE COURT: The only witnesses they could call who would  
18 be non-hearsay witnesses would be the actual investigators or  
19 people that were involved in the case.

20 MR. ACKOUREY: Correct.

21 THE COURT: Isn't that exactly what the treaty was meant  
22 to avoid? That we not have a trial or require people to come  
23 from a foreign country, whether it be the United States,  
24 requesting extradition of a foreign national back to our  
25 soil, that we don't have to send all our witnesses,



1 investigators and lab reports and all of that material over,  
2 we can do it by certification through the secretary of state.

3 MR. ACKOUREY: Well, I think that there's abundant case  
4 law that says that it's not to be a trial, I concede that.  
5 But I don't think that that's the kind of burden that would  
6 be placed on it. They would have to call witnesses, they  
7 would have to call witnesses to allow a cross examination, to  
8 allow a defendant or the person sought to be extradited to  
9 cross-examine and confront the witnesses. I guess I am  
10 saying that, yes.

11 And that I don't think though that that is requiring a  
12 separate trial or separate trials in two jurisdictions of  
13 contracting parties. It's simply asking the court to  
14 establish a prima facie case using live testimony.

15 THE COURT: And are you aware of any federal cases that  
16 have actually required that? That the witnesses be called  
17 from a foreign country to sit in a United States Court at the  
18 probable cause determination and give live testimony?

19 MR. ACKOUREY: Sylvester is the only case that I've seen  
20 that actually has applied Pennsylvania law in this context.

21 THE COURT: But now I'm not talking about whether it  
22 applied to Pennsylvania law, because Pennsylvania law may  
23 apply in some things, but are you aware of any cases where  
24 the foreign government was required to physically send  
25 witnesses and exhibits and testimony, aside from what they've

1 submitted to the secretaries of state in each of the  
2 countries to physically come into the United States Courts  
3 and hold live testimony?

4 MR. ACKOUREY: I am not, Judge.

5 THE COURT: Okay. Neither am I. Let me ask -- I  
6 understand you're basing that on your understanding of -- of  
7 your understanding of you believe the applicability of  
8 Pennsylvania law. But let me ask you, if you're incorrect --

9 MR. ACKOUREY: Uh-hum.

10 THE COURT: -- and federal law is what applies with  
11 respect to the determination of probable cause, do you agree  
12 then that under federal law that there is no requirement of  
13 actual live testimony in an extradition hearing because the  
14 Rules of Federal Procedure exclude extradition hearings from  
15 the normal determination?

16 MR. ACKOUREY: I think there's a number of cases from  
17 various circuits that have held that fact material evidence  
18 is sufficient.

19 THE COURT: All right. Is there anything else you want  
20 to argue on that?

21 MR. FISANICK: Yeah, I'd like to make a couple other  
22 points on the record. No. 1, it's curious that we would be  
23 applying in a federal proceeding Commonwealth ex. rel.  
24 Verbonitz v. Buchanan, which is a plurality decision of the  
25 Pennsylvania Supreme Court which is based on Pennsylvania

1 procedural law.

2 While the Rules of Federal Evidence, Federal Rules of  
3 Criminal Procedure do not apply to today's proceeding, we're  
4 still in federal court. And I would find that --

5 THE COURT: When you say they don't apply, they don't  
6 apply to the extent that they are specifically excluded --

7 MR. FISANICK: Correct.

8 THE COURT: -- from the provisions in federal law but  
9 not that they in theory don't apply in federal law?

10 MR. FISANICK: Correct. I think the drafters of the  
11 treaty would be quite shocked and surprised to find out that  
12 they had bargained for the application of this parochial  
13 hearsay at preliminary hearings in Pennsylvania District  
14 Magisterial Courts. In other words, if I understand  
15 counsel's argument correctly, basically it's a circular boot  
16 strap argument, which is here's what the treaty says and you  
17 have to apply Pennsylvania law, and oh, by the way, we'll  
18 read in Pennsylvania procedural law, which will trump federal  
19 procedural law and the treaty.

20 And I would put on the record that that's not what was  
21 clearly intended by the treatise, because all of the case law  
22 from the U.S. Supreme Court on the various circuit cases that  
23 have looked at this have said that this is an informal sui  
24 generis proceeding that allows hearsay because we don't drag  
25 detectives from foreign countries into the United States.

1 Much as under this treaty, we in the United States wouldn't  
2 want United States agents dragged into Canada to testify as  
3 to basically a legal issue, which is probable cause, which  
4 your Honor, the United States Magistrate Judge, determines in  
5 Federal Court every day. Is there probable cause to issue a  
6 search warrant? Is there probable cause to issue an arrest  
7 warrant? So the whole procedure of a treaty envisions a  
8 paper proceeding.

9 THE COURT: All right. I interrupted your original  
10 presentation, which may happen again.

11 MR. FISANICK: Oh, that's all right.

12 THE COURT: But go ahead, I'll let you continue.

13 MR. FISANICK: Anyway, as we stated in the government's  
14 prehearing brief, there are six issues at play in an  
15 extradition hearing. It is my understanding that five of  
16 those issues are clearly undisputed. The first issue is the  
17 subject matter jurisdiction of this court.

18 THE COURT: And I assume that you of course believe  
19 that there is sufficient evidence for each one of the six,  
20 correct?

21 MR. FISANICK: I do, your Honor.

22 THE COURT: Or you wouldn't be here. As to subject  
23 matter jurisdiction?

24 MR. ACKOUREY: There's no --

25 THE COURT: All right. And as to personal jurisdiction

1 over the defendant --

2 MR. ACKOUREY: No dispute, your Honor.

3 THE COURT: All right. And third, as to the fact that  
4 Ms. Harshbarger, who is in the court today, is in fact the  
5 individual who has been requested by the Government of  
6 Canada.

7 MR. ACKOUREY: There's no dispute on that issue.

8 THE COURT: And that there is in effect, in full force  
9 and effect a treaty between the United States and Canada  
10 that's lawful with respect to extradition.

11 MR. ACKOUREY: I would agree.

12 THE COURT: Okay. And that -- now let me get to the  
13 fifth one, and I'm not sure whether that's agreed to or not  
14 agreed to depending on the briefs that were filed before me.  
15 But the fifth one we're talking about really the dual  
16 criminality, whether the alleged crimes in Canada under the  
17 dual criminality provisions are in fact crimes, although they  
18 may not be called the exact same crime in the United States  
19 or in Pennsylvania, but let me go back to the government on  
20 that.

21 MR. FISANICK: Your Honor, as the Court has noted, there  
22 has to be a dual criminality requirement. If you look at the  
23 older version of this treaty, there was a schedule that was  
24 attached to the treaty that enumerated and delineated the  
25 crimes, manslaughter being one of them, for example, but

1 since the protocols amending the treaty were adopted between  
2 the nations of the United States and Canada it goes to what I  
3 call the more modern, broader approach to dual criminality,  
4 which is as long as the crimes are felonies, in other words,  
5 one year incarceration potential under federal law, and  
6 they're similar --

7 THE COURT: One year more, right.

8 MR. FISANICK: One year more, correct, one year more,  
9 your Honor.

10 THE COURT: A year is technically --

11 MR. FISANICK: One year more.

12 THE COURT: -- a misdemeanor --

13 MR. FISANICK: Right. And as long as the crimes are  
14 similar, your Honor has made mention of the fact that really  
15 the cases that have looked at this have looked at a step-wise  
16 procedure, which is first you look to federal law, or you can  
17 look to the law of the state jurisdiction, or failing that,  
18 you can look to the law of a majority of the jurisdictions in  
19 this case, that would be the states of the United States.  
20 So, looking at the first offense that Canada has asked  
21 extradition on, criminal negligence causing death. I don't  
22 think it will take great analysis to determine that is  
23 equivalent to both the federal involuntary manslaughter  
24 statute and the Pennsylvania involuntary manslaughter  
25 statute.

1 THE COURT: Let me ask you this: Let's first talk about  
2 federal, because if we determine that it is in fact under the  
3 Federal Law 18 U.S.C. Section -- what is it, 112(a)?

4 MR. FISANICK: Yes.

5 THE COURT: Okay. If it's the same as that, I don't see  
6 that we're going anyplace else and I'm not so sure that the  
7 defendant is disagreeing that that would in fact be the  
8 corollary under --

9 MR. ACKOUREY: Yes.

10 MR. FISANICK: I don't think he disagrees either, your  
11 Honor.

12 THE COURT: Is that correct, Mr. Ackourey?

13 MR. ACKOUREY: That is correct, Judge.

14 THE COURT: All right. So you agree there is a  
15 corollary on the felony charge which is covered by United  
16 States Code charge?

17 MR. ACKOUREY: That is correct.

18 THE COURT: And so therefore, I mean, you're welcome if  
19 you want to make some other argument, but I don't see how the  
20 Pennsylvania law has any relevance as a result of that  
21 agreement.

22 MR. FISANICK: That is my alternative argument since the  
23 defendant concedes that that's an extra valuable [ph]  
24 offense, I'll move on to the second offense under the Crimes  
25 Code of Canada, which is the careless use of a firearm. Two

1 potential statutes are in play here, and the government has  
2 cited them in the brief. The first one, and I'll --

3 THE COURT: Let's argue this first, because first of  
4 all, you're not alleging that there is a federal corollary,  
5 correct?

6 MR. FISANICK: I am not alleging that there is a federal  
7 caudate, correct.

8 THE COURT: And you also do not believe that there is a  
9 federal --

10 MR. ACKOUREY: I have not found --

11 THE COURT: Okay, all right. And the reason I say that,  
12 so then we would move logically to the next step, which is  
13 the state which you're going to argue.

14 MR. FISANICK: Correct. And I will explain why the  
15 government makes an alternative argument here. The  
16 government argues that this would be equivalent to  
17 Pennsylvania's defense of recklessly endangering another  
18 person, which is graded as a misdemeanor of the second  
19 degree. And a crime called shooting at or causing injury to  
20 human beings, which is actually a game offense, which is  
21 classified in Pennsylvania as a misdemeanor of the first  
22 degree.

23 THE COURT: Now, that's 34(a) Pennsylvania Code.

24 MR. FISANICK: That's correct, Title 34 of the  
25 Pennsylvania Consolidated Statute 2522.



1 THE COURT: 22(a), okay.

2 MR. FISANICK: You got it, your Honor. The reason why  
3 the government makes this argument is while the offenses  
4 don't have to be named the same, they don't have to have the  
5 same elements, they have to basically prosecute the same kind  
6 of criminal conduct. Not to make a ludicrous example, if  
7 Canada had a law that said you couldn't wear the color blue,  
8 Pennsylvania wouldn't have an equivalent statute, you  
9 wouldn't be able to extradite somebody to Canada for  
10 violation of the not allowed to wear the color blue in  
11 Canada. So you have to look at basically the elements, but  
12 not conclusively determine they're the same.

13 Now, if you look at Pennsylvania law, your Honor,  
14 Pennsylvania law has prosecuted people for pointing loaded  
15 firearms in a reckless fashion under the recklessly  
16 endangering statute. The Title 34 offense, which is the  
17 shooting at someone through carelessness or negligence  
18 basically has a lesser standard of mens rea, as I see it.  
19 And as you'll see in the government's footnote, it's  
20 questionable under Pennsylvania law whether if this issue  
21 were raised before a Pennsylvania court, a Pennsylvania court  
22 wouldn't say that you have to have the same level of mens rea  
23 as a Crimes Code or Title 18 offense, in other words,  
24 criminal negligence or recklessness. Because Pennsylvania  
25 law is fairly clear to me, that it does not punish people by

1 incarceration through an act of ordinary negligence or mere  
2 negligence.

3 THE COURT: So when you talk criminal negligence,  
4 although you're using the word negligence, what you're really  
5 referring to is wanton or reckless as your definition.

6 MR. FISANICK: Correct, exactly. And we would point out  
7 that that is what the Canadian government alleges in the  
8 affidavit. They have alleged wanton reckless disregard  
9 behavior, which is equivalent.

10 THE COURT: And so we're in agreement on that as well.  
11 Although the Canadian statute, the Canadian Criminal Code 220  
12 and 219 I think it is, that although they title their crime  
13 criminal negligence, by definition it clearly is a higher  
14 mens rea status, and that's that the negligence is not what  
15 we would call tortuous negligence, but rather it's described  
16 more as a wanton and -- or described actually as a wanton and  
17 reckless act, correct, would you agree on that?

18 MR. ACKOUREY: Which I would argue, Judge, is akin to  
19 recklessness under the Pennsylvania statute.

20 THE COURT: And you'd agree with that I think?

21 MR. FISANICK: I agree, it is, even though they called  
22 it one thing, if you look at the actual wording of it. So I  
23 would submit to you, your Honor, that it's very similar to  
24 both of those statutes in Pennsylvania, either one can fit.  
25 Perhaps on the fact that it's a hunting offense, the Title 34

1 offense, if you were trying to put the peg in the hole, fits  
2 a little better, but the recklessly endangering also fits  
3 too, because it encompasses reckless conduct and it's also  
4 been used for pointing loaded firearms at people in  
5 Pennsylvania and prosecuting and convicting them.

6 THE COURT: Now both of those are misdemeanors under  
7 Pennsylvania law, but included a degree of punishment up to  
8 two years or up to five years, so you know, it's called a  
9 misdemeanor. Pennsylvania is a little bit of an obscure  
10 state, in that it still calls things that are punishable by  
11 more than a year as misdemeanors, even though in most other  
12 states the federal government refers to that as a felony.

13 MR. ACKOUREY: That's correct.

14 MR. FISANICK: That's correct, your Honor. So again,  
15 whichever crime or both crimes you choose, the Canadian  
16 offense of careless use of a firearm is also an extraditable  
17 offense under the fifth element, and I don't think that the  
18 defense actually has much of a quibble with that either.

19 THE COURT: Now, I know that I don't believe you have a  
20 quibble, at least it may just add an arresting element, Mr.  
21 Ackourey, but as to the Title 34 offense, that it's my  
22 understanding that --

23 MR. ACKOUREY: That's correct.

24 THE COURT: -- you agree that that's the higher offense  
25 punishable up to five years?

1 MR. ACKOUREY: That's correct.

2 THE COURT: You agree that that would be a corollary.  
3 What about this argument that the two year offense, the  
4 reckless, do you agree that that would be a corollary  
5 offense?

6 MR. ACKOUREY: Well, only to the extent that the  
7 Canadian statute specifically requires the use of a firearm  
8 in the criminal conduct. Obviously reckless endangering does  
9 not. It can encompass a whole hosts of activities, but  
10 otherwise reckless and at risk of injury or death. I would  
11 argue that the violation of the hunting laws is certainly  
12 more applicable. I'm not sure that ultimately in the great  
13 scheme of things it's going to make much of a difference  
14 because I think what we're looking at is ultimately the  
15 analysis of the conduct and whether that reaches the reckless  
16 requirement.

17 THE COURT: But for the extent -- to the extent that we  
18 kind of dot our I's and cross our T's --

19 MR. ACKOUREY: I understand.

20 THE COURT: -- as to what the corollaries are, we're in  
21 agreement then that -- or you're in agreement then, the  
22 parties, that the hunting offense, the Title 34 offense under  
23 the Pennsylvania Consolidated Statutes, that that offense  
24 would be a corollary offense?

25 MR. ACKOUREY: That's correct.

1 THE COURT: And as to the lesser offense, the reckless  
2 endangerment, you believe that it is?

3 MR. ACKOUREY: I'm saying that since the Canadian  
4 offense specifically requires as an element the reckless use  
5 of a firearm and careless use of a firearm, that I don't  
6 believe it does, but --

7 THE COURT: And that's because the Pennsylvania offense  
8 you're referring to here doesn't in the statute include the  
9 term firearm, but is there any doubt that the use of a weapon  
10 of any kind including a firearm could result in a reckless  
11 endangerment?

12 MR. ACKOUREY: Of course.

13 THE COURT: Okay.

14 MR. FISANICK: So then we move to the disputed element,  
15 which is element six.

16 THE COURT: Not yet. Let's first talk on that second  
17 one about the statute of limitations. You did not address  
18 that in --

19 MR. FISANICK: I did not because I did not have the  
20 benefit of counsel's brief, since we simultaneously filed  
21 them. I could, with the court's permission, file a  
22 supplemental brief, but in lieu of that I have --

23 THE COURT: Now, there was never -- so you know, I  
24 wanted you to both file simultaneous briefs, but that was not  
25 an indication that you weren't able to file -- if you wished

1 to file other matters after you received it, that you can  
2 file them. I just wanted to make sure that we got stuff  
3 in --

4 MR. FISANICK: Okay.

5 THE COURT: -- originally. But that wasn't meant or  
6 shouldn't have been interpreted as meaning that somebody was  
7 unable to file -- on either side -- to file further  
8 information response or reply. But anyway, go ahead.

9 MR. FISANICK: Anyway, looking at this issue, and this  
10 issue from my understanding of the defense's brief would only  
11 apply to the hunting offense, the careless use of a firearm,  
12 because as the court is well aware, the statute of  
13 limitations in Pennsylvania under Pennsylvania law would not  
14 have run for the careless death of the manslaughter  
15 equivalent. So we're really only looking at the second of  
16 two extraditable offenses. And --

17 THE COURT: And under either one of the ones that you  
18 would allege, since they're both misdemeanors under 5222 or  
19 whatever the Pennsylvania corollary is in Title 42, the  
20 statute of limitations on a misdemeanor would be up to two  
21 years, right?

22 MR. FISANICK: That's correct.

23 THE COURT: So their argument is that either one of  
24 those are outside of the statute of limitations if we're  
25 applying the Pennsylvania law and the statute of limitations,

1 and so is there something you want to say about that?

2 MR. FISANICK: I do, your Honor. The treaty is clear,  
3 the treaty is clear that the statute of limitations that  
4 applies here is the statute of limitations of the requesting  
5 jurisdiction. That would be Canada. And Canada has no  
6 statute of limitations for either of these offenses.

7 Now, I am well aware of the extradition case of  
8 Sylvester in this district. And I would point out to the  
9 Court, and I have copies here, the Second Circuit Court of  
10 Appeals in a case called Murphy, this is out of the Northern  
11 District of New York, had exactly the same issue, which was  
12 the person whose extradition was sought was claiming that the  
13 five year statute of limitations in New York applied and not  
14 the Canadian statute of limitations. Now, the Second Circuit  
15 has ruled that it is the treaty provision that applies. So I  
16 believe it is Article 4 of the treaty that talks about the  
17 statute of limitations, so I would point that out.

18 Now there's a subsidiary argument that was made in  
19 Sylvester about statute of limitations becoming an element of  
20 the underlying jurisdiction offense. And I don't think it  
21 was properly addressed in that case. In fact, I think that  
22 case is incorrectly decided for a lot of reasons. But if we  
23 were to follow that rationale, which was followed in  
24 Sylvester, the only case that I found, there is a case out of  
25 the Northern District of Georgia where the exact same

1 argument was made.

2 And the argument, as I follow defense argument in  
3 Sylvester, and here it goes something like this, you have to  
4 prove the elements of the Pennsylvania offense. There's a  
5 Pennsylvania Superior Court case that says statute of  
6 limitation is an element of a Pennsylvania offense.  
7 Therefore, you read the statute of limitations of  
8 Pennsylvania into the Pennsylvania offense, it's two years,  
9 the two years has passed, thus the statute of limitations  
10 bars the extradition on that offense, that's a fallacious  
11 argument for a couple of reasons.

12 No. 1, the treaty is clear that it is the requesting  
13 jurisdiction's statute of limitations that governs. That  
14 would be Canada. Statute of limitations is an element of the  
15 offense only if it were being tried in Pennsylvania. That  
16 would be a defense to a Pennsylvania criminal prosecution if  
17 the statute of limitations were two years. We're not dealing  
18 with a Pennsylvania criminal prosecution here, we're  
19 basically dealing with federalism.

20 So we can't read in a statute of limitations to wipe out  
21 a treaty provision despite the fact that I believe it 's  
22 Article 10 of the treaty says you use the law of the  
23 jurisdiction.

24 And here's another reason that I think is more  
25 common-sensical why it doesn't work. The contracting parties



1 to the treaty, the United States and Canada contracted that  
2 the receiving jurisdiction's statute of limitations would  
3 govern. Using the defense's argument here, that means if  
4 Mrs. Harshbarger goes to New Jersey and we arrest her in New  
5 Jersey on an extradition warrant, for example, and the  
6 statute of limitation for a caudate offense for using a  
7 firearm in a hunting violation is five years, that means the  
8 statute of limitations gives her no relief. Canada and the  
9 United States did not bargain to have 50 or -- using the  
10 federal system -- 51 different statutes of limitations to  
11 apply to an extradition proceeding purely fortuitously  
12 dependent upon which jurisdiction the defendant was located  
13 in.

14 THE COURT: But isn't that exactly what happened with  
15 respect to the statutes? I mean, it just turns out that  
16 there's no federal corollary to the statutes we're talking  
17 about, so didn't they effectively bargain for 50 or 51  
18 different potential statutes on things that are not covered  
19 under federal --

20 MR. FISANICK: They bargained for equivalent statutes.  
21 They didn't bargain for 50 or 51 different statutes of  
22 criminality. They bargained for conduct that would give rise  
23 to criminal punishment in both countries. That's why the  
24 language was very, very, very general under the dual  
25 criminality provision. But for the statute of limitations

1 it's really clear. If a country would have bargained for a  
2 different statute of limitations they would have clearly said  
3 in the treaty the statute of limitations of the place where  
4 the person is located governs, and it doesn't say that. It  
5 says the statute of limitations of the receiving nation.

6 So, I think that you cannot abrogate a very clear  
7 provision of the treaty by again applying Pennsylvania  
8 procedural law in an idiosyncratic fashion, to read in a  
9 Pennsylvania statute of limitations based on a circular  
10 reason. You say okay, we have this section of the treaty  
11 which says Canada statute of limitations, which they don't  
12 have one, applies. Another section of a treaty that says you  
13 apply the law of the place where the defendant is located and  
14 the proof thereof, so we're going to read Pennsylvania's  
15 procedure into it, including the statute of limitations, it's  
16 two years, thus the extraditable offense is barred. That's  
17 clearly not envisioned by the treaty. And in fact, I  
18 couldn't find any cases that support the approach in  
19 Sylvester.

20 In fact, as I said, in Murphy, which the cite to that  
21 case is 199 F.3d 599, 2d Circuit 1999. Clearly agrees with  
22 my argument here today. And the Northern District of Georgia  
23 case is Freedman. And again, I have copies for counsel and  
24 the court here. Freedman v. United States at 437 F. Sup.  
25 1252 1977 say exactly that. Because you really get an absurd

1 result if you go to this looking to Pennsylvania law for a  
2 procedural defense that's not granted by the treaty.

3 MR. ACKOUREY: Well, I think counsel is missing a  
4 distinction between a procedural defense and an element of  
5 the defense.

6 THE COURT: I hate to interrupt, but let me ask you  
7 first, does the treaty speak specifically to which statute of  
8 limitations applies?

9 MR. ACKOUREY: Article 4 talks about the statute of  
10 limitations and how it is to be applied in the treaty.

11 THE COURT: Talks about it. And what does it say?

12 MR. ACKOUREY: It talks about applying the statute of  
13 limitations of the requesting state.

14 THE COURT: And in fact, in this particular case, on  
15 both of the offenses, but we're really more interested in the  
16 second offense --

17 MR. ACKOUREY: Right.

18 THE COURT: Because the first offense no one is arguing  
19 that it's outside of the statute of limitations, in either  
20 application, whether it be Pennsylvania law -- I'm sorry,  
21 United States law or whether it be Canadian law. But on the  
22 second one the statute -- is there any disagreement that the  
23 statute of limitations in Canada on both of the offenses  
24 is -- there is no statute.

25 MR. ACKOUREY: According to the submission, it has not,

1 right.

2 THE COURT: All right. So we know that there is no  
3 statute of limitations in Canada. The treaty seems to  
4 indicate when one reads it that the receiving country,  
5 meaning the country that will accept or take back the person,  
6 in this case Canada, that their statute applies, would you  
7 agree with that, that that appears to be what the treaty  
8 says?

9 MR. ACKOUREY: It appears to be, yes.

10 THE COURT: Okay. And I say that only because as a  
11 background to -- I understand you're now going to argue that  
12 it doesn't exactly mean that, but go ahead.

13 MR. ACKOUREY: Right. I think we go back to the second  
14 protocol, the argument that says we're going to be going --  
15 looking at the law of the contracting parties, and if none  
16 then the state's. And so we're in Pennsylvania, so we're  
17 looking at Pennsylvania law, applying Pennsylvania law to two  
18 statutes that the government has argued are analogous to  
19 Canadian statute.

20 And Pennsylvania law has held that the statute of  
21 limitations isn't -- is essentially an element of the offense  
22 itself. It's not only an affirmative defense, but it's  
23 actually an element of the offence itself to be established  
24 by the government at a prima facie hearing. Statutes clearly  
25 run under Pennsylvania law. And I think the Court is correct

1 in that in fact what the parties have bargained for is if the  
2 laws of the contracting parties do not apply then there's no  
3 analogous federal provision that applies to the crimes that  
4 we've been discussing, the crime we were discussing, we go to  
5 the state laws of the state. So, we have -- maybe we do have  
6 50 or 51 different jurisdictions, but that is what was  
7 anticipated. And since it's a material element of the  
8 offense itself, since the statute is run under Pennsylvania  
9 law, there's no question that the -- there is no analogous  
10 Pennsylvania statute since the statute was drawn.

11 THE COURT: Is the statute of limitations in  
12 Pennsylvania an element of the crime or is it an affirmative  
13 defense? There is a difference.

14 MR. ACKOUREY: Well -- there is a difference. In a  
15 prima facie hearing in Pennsylvania the Commonwealth -- in a  
16 state case the Commonwealth would bear the burden of  
17 establishing that the statute does not run.

18 THE COURT: But that still doesn't answer my question.  
19 My question is not what their procedure would require in a  
20 preliminary examination, but is the statute of limitations  
21 under Pennsylvania law, is that an element of the offense or  
22 is it an affirmative defense?

23 MR. ACKOUREY: I would argue that really -- there's a  
24 procedural element, in that one could raise the running of  
25 the statute of limitations as a defense. But I would argue,

1 Judge, that -- and I think Sylvester is going to address  
2 this. It's also a part and parcel of the government's burden  
3 as an element of the offense that it has not run. That the  
4 statute has not run.

5 THE COURT: Okay. Let me just ask you one other  
6 question on the statute.

7 MR. FISANICK: Yes, your Honor.

8 THE COURT: And that is with respect to the statute, is  
9 everybody in agreement that although the alleged time of the  
10 incident, which was in 2006, September 14.

11 MR. FISANICK: 14.

12 THE COURT: 2006, that within two years the Canadian  
13 authorities received a warrant in Canada, but it wasn't  
14 within two years that the United States received a warrant in  
15 the United States. On that issue, forgetting the  
16 disagreement presently, are we in agreement that if the  
17 statute was applicable, the time period is when it occurs in  
18 the United States, not when the Canadian authorities have  
19 done it, or are we not?

20 MR. FISANICK: I don't know the answer to that question,  
21 to be honest with you. I concede that the U.S. proceeding is  
22 outside the two years. But the Canadian charge was filed  
23 within two years of the actual incident.

24 THE COURT: Okay. So you're not conceding that the  
25 United States execution, meaning the gathering of a warrant

1 or the submission by the court, the filing of it, is what --

2 MR. FISANICK: Correct.

3 THE COURT: -- terminates the statute of limitations?

4 And I assume your position is that it is?

5 MR. ACKOUREY: It is. I can't cite any case law that  
6 would say that, but I would argue that the only court that  
7 had jurisdiction over my client at the time is the United  
8 States Court. So the issuance of the summons here is what is  
9 the triggering event. And clearly that was beyond the two  
10 years.

11 THE COURT: Okay. Now you want to move on -- anything  
12 else on those issues? Are we going to move on to six, and  
13 that is basically whether or not that there's competent  
14 evidence to support a probable cause finding for which -- the  
15 charges for which the extradition is sought.

16 MR. FISANICK: Yes, your Honor. If this were a normal  
17 federal criminal proceeding the government in the United  
18 States would be presenting an affidavit of probable cause to  
19 support a criminal complaint on charges that the government  
20 felt lay against a defendant. The only difference we have  
21 here is, we don't have an ex parte proceeding, we actually  
22 have an adversarial proceeding looking at the paper that's  
23 filed. And your Honor --

24 THE COURT: Well wait. That's not exactly correct,  
25 right? If this was the United States proceeding under Rule

1 5.1 it would have been post complaint, which has already been  
2 filed.

3 MR. FISANICK: Correct.

4 THE COURT: And that would have actually had an  
5 adversarial proceeding at a preliminary hearing where live  
6 witnesses would be called. They could testify to hearsay but  
7 there would probably be live witnesses.

8 MR. FISANICK: Correct. But if -- my argument, my  
9 point, your Honor, is if the government presented this to  
10 you, your determination of probable cause is based on the  
11 affidavits. And that's been the government's position since  
12 the beginning of this proceeding, which is it a sui generis  
13 proceeding where we go on the paperwork and the document and  
14 the evidence that has been supplied. The adversarial  
15 proceeding comes down the way, so to speak. What I'm asking  
16 the court to do is, you're looking at this as an affidavit to  
17 see if there's probable cause to support the charges. And  
18 that's what we have.

19 Defenses are not an issue. Credibility is not an issue.  
20 Weight of the evidence is not an issue. Whether these  
21 charges can ultimately be proven by Canada's burden of proof,  
22 which I understand is also beyond a reasonable doubt, not an  
23 issue. The issue is probable cause for charges. And we have  
24 determined that these are in fact extraditable charges. So  
25 the question is, do they support what the Canadians have



1 asked us to do? The facts to the light most favorable to the  
2 Canadian government show this, and they are summarized in the  
3 government's brief, that this defendant made statements to  
4 the Royal Canadian Mounted Police that while she was hunting  
5 in Canada she and her husband and a guide would walk in the  
6 bush to hunt while she and the children waited for their  
7 return. So it is clear that the defendant knew that on the  
8 night of the incident her husband and the guide had left the  
9 truck while she remained with the children. She knew that he  
10 was in the woods.

11 She admitted to the investigators that it was, quote,  
12 probably too dark and that she should not have fired the  
13 shot. Now, obviously that statement and that finding really  
14 is the linchpin here as to whether this conduct rises beyond  
15 tortuous mere ordinary simple negligence to the level of  
16 criminal negligence, reckless conduct or conduct evincing a  
17 wanton disregard.

18 Following the shooting the constables did I think a very  
19 thorough investigation in the area of where the victim was  
20 found. And despite the defendant's story that she had  
21 watched a black bear for a couple of minutes, they did not  
22 see the footprints that resembled those of a black bear or  
23 any other type of animal. Now, this incident occurred at  
24 approximately 7:55 p.m. on the date in question, sunset  
25 having happened at 7:31 p.m.

1           And I know that counsel has made the argument that she  
2           was within her rights to be hunting within a half an hour of  
3           sunset. That's correct. The Canadians have not alleged that  
4           she's in violation of the regulation for hunting after hours.  
5           But I will submit to you in preparation for the argument  
6           that's a strongman argument. Just because she was legally  
7           hunting within a half an hour of sunset doesn't mean that she  
8           was entitled to fire a shot. And I would say, your Honor,  
9           for example, it's almost noon. If the clouds would get  
10          really dark because of a thunder storm or a solar eclipse and  
11          hunting was in season, yes, you could be hunting at twelve  
12          o'clock noon in downtown Wilkes-Barre today, Luzerne County,  
13          but that doesn't answer the question as to whether you should  
14          be taking a shot at that time based upon visibility  
15          conditions.

16          THE COURT: I think they banged a couple yesterday in  
17          Wilkes-Barre, didn't they?

18          MR. FISANICK: Did they really? The Canadian Mounties  
19          did two reenactments, and as the Court is well aware, and I  
20          know the Court has read the documents in preparation for the  
21          prior decision in this case and the hearing today, and the  
22          constables were in agreement that both the lighting  
23          conditions were too dark to have fired a shot. So the Royal  
24          Canadian Mounted Police have opined that she should not have  
25          taken the shot, she admitted it was too dark and she

1 shouldn't have taken the shot. Two reenactments showed  
2 pretty much the same thing. And the other thing we have to  
3 keep in mind, your Honor, is we have to look at when the shot  
4 was taken. Was this a shot where it was a beautiful sunny  
5 day, a bear was in view of the defendant and the bear was  
6 close enough and the victim darted out in front between the  
7 bear and the defendant with her 30-odd six rifle. If that  
8 were the situation the answer would be tortuous negligence,  
9 if that, perhaps contributory negligence on behalf of the  
10 victim.

11 Now, admittedly the victim wasn't wearing blaze orange  
12 here and that contributed to his death, and I know the  
13 Canadian authorities actually recognize that and I have some  
14 uncertified documents from Canada saying, well, you know, you  
15 should be wearing your blaze orange. But the point of the  
16 matter is we have to look at the circumstances of the  
17 lighting. This is the twilight time of day. Hunting is  
18 legal, but it's still pretty hard to see because it's within  
19 a half an hour after sunset, so it's not a bright sunny day,  
20 12 noon like my prior example.

21 No. 2, you know there are other human beings in the  
22 woods. The defendant is quite clearly aware that husband and  
23 guide have gone out to hunt.

24 Third. We have to look at the terrain. We have a shot  
25 taken by the defendant at an object obscured by grass that's

1 shoulder height, about four feet high, 200 feet away. And  
2 apparently from what the Mounties determined, the victim  
3 would have been walking back across, for lack of a better  
4 term, a logging trail or a truck trail or something like that  
5 and there were ruts in the road and apparently water was in  
6 the ruts and he would have, if I may, been standing and  
7 looking at his boots to make sure he's not getting a boot  
8 full of, you know, muddy water or falling down or tripping  
9 because the visibility isn't that good, so he has his head  
10 down and he's bobbing and moving kind of back and forth, so  
11 he's not erect. His face isn't apparently visible over the  
12 four-foot high thicket, his head is down, he's not wearing  
13 blaze orange. He's just basically as the Mounties I think  
14 described it as a black unidentifiable mass.

15 So that's what we have. We have a shot fired from a  
16 high-powered rifle at a distance of 206 feet into a four-foot  
17 high thicket at some sort of moving mass. No evidence that  
18 there was a bear there. And the other thing that strikes me  
19 your Honor as very unusual here is, if this defendant's story  
20 is to be believed, and that's something for a Canadian jury  
21 or court to decide, and she claims she had seen the bear  
22 walking around for a couple of minutes. When you have a  
23 clear shot at a bear shoot the bear. Do you wait until the  
24 bear goes behind the four-foot high thicket of grass so that  
25 you have a bobbing mass to take a shot?

1           So from a common sense logistical standpoint, why is the  
2 shot being taken at this particular time? We have problems  
3 of visibility, we have problems of terrain. We have the fact  
4 that she's standing on the bed of a pickup truck to make the  
5 shot with her small children in the truck. We have a  
6 distance of 206 feet away, which admittedly for a 30 odd six  
7 with a scope is not a particularly long shot, it's a  
8 particularly close shot. And you've seen a bear and you've  
9 watched the bear and you've done nothing.

10           And then the bear disappears behind the thicket and you  
11 shoot blindly into a thicket at an unidentified object that  
12 as the constables put is really nothing more than a moving  
13 mass. Knowing full well you have living, breathing human  
14 beings who are out hunting, and if we're following the  
15 hunting laws of Newfoundland and Labrador you know would be  
16 returning to the hunting camp in the truck very soon, because  
17 hunting is about to end in a half an hour past sunset.  
18 That's what we have.

19           I would submit to you, your Honor, that we're not here  
20 to be armchair detectives and we're not here to decide guilt  
21 or innocence, we're not here to interpret the facts as to  
22 what exactly happened on that tragic day, and this is a  
23 tragedy, don't get me wrong, this is terrible for everybody  
24 who has looked at this case, been involved in this case or  
25 touched this case.

1           What we have to determine is does this support probable  
2       cause to expedite this defendant to Canada? And I submit  
3       that it clearly does. We don't have a case where the victim  
4       darted in front of the gun, we don't have a case where a gun  
5       went off by accident because it was dropped or somebody  
6       tripped. We don't have a case of a small child, God forbid,  
7       picking up the gun and the gun is being discharged. No. We  
8       actually have an intentional, deliberate shot, a tragic shot,  
9       that took the life of Mr. Harshbarger because this woman  
10      sitting here in court did something that every small child  
11      who's taken a hunter/trapper safety course in Pennsylvania  
12      knows, you don't shoot at an unidentifiable target.

13           So I would submit to you that despite sympathetic  
14      evidence that might show a defense, sympathetic evidence that  
15      might show contributory negligence, whether that's a defense  
16      or not in Canada, I don't know, but that's not for us to  
17      determine, there's enough evidence to comply with the treaty  
18      and comply with Canadian Government requests and have Mary  
19      Beth Harshbarger extradited for the two charges. Thank you.

20           THE COURT: Okay. Mr. Ackourey.

21           MR. ACKOUREY: Judge, applying the law to the facts as  
22      we know them, and again, looking at the facts and observing  
23      the facts in a light most favorable to Canada, the Court must  
24      nonetheless determine whether or not there is probable cause.  
25      And we start with the wanton and reckless disregard for life

1 standard. Section 1112 of Title 18 of the United States Code  
2 requires a showing that either the actor acknowledged that  
3 the conduct was a threat to the life of another, or  
4 acknowledge such circumstances as could reasonably have  
5 enabled the defendant to foresee the peril to which her act  
6 might subject another.

7 In this case we have a family, husband, wife and  
8 children. They've hired a guide, Lambert Greene, his  
9 affidavit is part of the record. They're not out there  
10 willy-nilly, they've hired a guide who supposedly knows the  
11 topography, knows the terrain and knows the hunting rules and  
12 regulations. He takes them to a location that's very remote.  
13 They've done this before, where Greene and the decedent exit  
14 the vehicle, go out into the woods while my client is to  
15 remain with the children, with a gun, and the understanding  
16 is Mr. Greene's affidavit indicates what -- that she was to  
17 shoot if she saw a moose or a bear. That's what she's  
18 operating under. On this particular day the hunting day  
19 would have ended at 8:01. Sunset would have been at 7:31.  
20 And the fired shot in the Canadian investigation was at 7:55,  
21 within that timeframe.

22 THE COURT: That's their estimate.

23 MR. ACKOUREY: Pardon?

24 THE COURT: That's their estimate. Obviously they --

25 MR. ACKOUREY: That's correct.

1 THE COURT: -- but they estimate 7:55.

2 MR. ACKOUREY: That's correct. But that is the  
3 uncontradicted evidence in the filed report.

4 THE COURT: No doubt.

5 MR. ACKOUREY: The government of Canada or the  
6 governments in Newfoundland and Labrador have determined that  
7 firing this shot a half hour after sunset is permissible.  
8 They have determined that there is sufficient light on a  
9 typical day to allow hunting. There's nothing in the  
10 affidavits that I'm aware of that would say that there were  
11 any particularly significant weather patterns or conditions  
12 that would have altered or affected that.

13 The decedent and the guide go into the woods. My client  
14 remains at the truck. She sees what she believes to be a  
15 bear. Two reenactments confirm that based upon the time of  
16 day or location, the location of the decedent and the  
17 conditions as they existed at the time, that it was possible  
18 that she could have believed that was a bear. Twice they did  
19 it. Twice they came up with the same conclusion.

20 As already testi- -- or already discussed, the ground  
21 condition is such that the decedent would have been walking  
22 like a bear; bobbing up and down; going from track to track;  
23 moving sideways. The grass, and it's interesting because  
24 this was noted by counsel, through his affidavit, indicates  
25 that it's deceiving when you look at the -- where the



1 decedent was found, because while the grass appeared to be  
2 knee high from the truck, in fact it was shoulder high, which  
3 means that the object that Mary Beth was looking at, the  
4 person she was looking at, would not have looked like a six  
5 foot man, it would look like a much smaller being, consistent  
6 with, as she said, she thought she was shooting at a bear.

7 THE COURT: If counsel indicated that it was four foot  
8 high, I have a recollection that the affidavit was five foot  
9 high.

10 MR. FISANICK: Between --

11 MR. ACKOUREY: It's between four and five. I believe  
12 they said shoulder high I thought is what his affidavit said.

13 THE COURT: All right.

14 MR. ACKOUREY: So, there's an allusion there of a  
15 smaller being that she's firing at. She fires the shot. And  
16 obviously, unfortunately, she killed her husband. When we  
17 look at the facts in the case, knowing that her act was a  
18 legal act in that she was firing legal within the  
19 regulations, hunting regulations of the province, the  
20 question is let's look at the other circumstances surrounding  
21 it and ask, Is there recklessness? Is there wanton reckless  
22 disregard for life?

23 Well, the other factors seem to support a conclusion of  
24 no. The topography; the way he was dressed; the way he moved  
25 all seemed to suggest no. The linchpin of the government's

1 case, your Honor, the prima facie basis or the probable cause  
2 basis is it was too dark to shoot. But it was a legal act at  
3 the time, at least within the hunting regulations. The one  
4 investigator said that coming out of the --

5 THE COURT: Let me just ask you, you keep saying it's a  
6 legal act. If it was 12 noon and bright sunshine --

7 MR. ACKOUREY: Sure.

8 THE COURT: -- and there was something moving that you  
9 couldn't identify and you shot at it, is that okay? I mean,  
10 or is it just a question of --

11 MR. ACKOUREY: Oh, no, I'm not saying that it's okay.  
12 It is raised to the level of gross negligence or  
13 recklessness.

14 THE COURT: Right. But for example, if I go on 81 today  
15 and the speed limit says 55 and there's an ice storm and I  
16 travel 45 or 40, and I end up killing somebody, I could have  
17 traveled 55 according to the speed limit, but the conditions,  
18 even though the speed limit says that, may not have been  
19 appropriate to do that at the time. So I guess at 8:01 she  
20 has to stop shooting, but at eight o'clock, even though I  
21 would think to most of us there would be no discernible  
22 difference in the light of the day in that one minute, is  
23 that of any other significance? I get what you're saying to  
24 the extent that it was not per se a violation of the hunting  
25 law to hunt at 7:55, but is that something that is really

1 offering me anything I guess? Isn't it really what were the  
2 conditions at the time?

3 MR. ACKOUREY: Well, no. I would disagree to the extent  
4 that using your analogy, if the roadside said 55 miles per  
5 hour, and traveling 55 miles per hour in an ice storm, okay,  
6 maybe the fact that it says 55 miles an hour doesn't excuse  
7 your negligent or grossly negligent behavior. But that's not  
8 what we have here. We have nothing to indicate that there  
9 were any environmental conditions or other conditions which  
10 would make firing a shot up to 8:01 somehow grossly  
11 negligent.

12 THE COURT: Except that we know that we're 24 minutes  
13 after sunset. I mean, I understand that you're saying that  
14 under law they say you can be out a half an hour after  
15 sunset, but you're 24 minutes after sunset. Is that  
16 different than being when the sun is up?

17 MR. ACKOUREY: Well, I guess. I guess somewhere in  
18 Canada someone decided that there's sufficient light to fire  
19 a shot in normal weather conditions up to 8:01. I mean,  
20 that's the only reasonable basis for the regulation, at some  
21 point someone must have said there's enough light to fire a  
22 shot up to 8:01, and beyond that we're not going to permit  
23 it. And there's no evidence that there's any adverse  
24 conditions that would in any way affect that determination.

25 I think -- I mean, if you were looking at factors

1 leading to this unfortunate series of events, you would have  
2 to say that the failure to wear orange, and I don't mean to  
3 speak ill of the dead, but the failure to wear orange is  
4 probably the greatest factor leading to this tragic event.  
5 No orange hat, no orange vest, no orange pants in conditions  
6 that presented themselves on that day made him look like a  
7 bear.

8 THE COURT: Assuming all that is true, and it clearly is  
9 true by the affidavit and I agree with you that I don't  
10 understand why somebody wouldn't do that, but would it be  
11 reasonable to assume that on the facts we have here that Mrs.  
12 Harshbarger was aware of the fact that he wasn't wearing  
13 orange?

14 MR. ACKOUREY: I would assume -- based upon the facts we  
15 have, I would assume that she would have known that he had no  
16 orange on, that's correct. But it's complicated by the fact  
17 that he has dark clothes on. So it's a double whammy if you  
18 will, not only did he not have orange, he had dark clothes.

19 I guess -- I'm looking at U.S. v. Pardee, the Fourth  
20 Circuit case, and they're paraphrasing Maryland v. Chapman.  
21 If the resulting deaths were merely accidental or due to an  
22 honest error in judgment in performing a lawful act the  
23 existence of gross negligence should not be found. And I  
24 think that's exactly what we have here. In other words, was  
25 it an error of judgment for my client to fire a gun? Perhaps

1 it was. Obviously it was.

2 THE COURT: Is that part of the extradition proceeding?

3 MR. ACKOUREY: No, it is not.

4 THE COURT: Is there a probable cause hearing or is it a  
5 determination after trial beyond a reasonable doubt?

6 MR. ACKOUREY: Excuse me. Pardee was discussing  
7 extradition. Maryland v. Chapman which it cites was not an  
8 extradition hearing. I guess the point is, Judge, that there  
9 was clearly an error in judgment for firing, but that's not  
10 enough to get to a wanton reckless disregard for life  
11 standard, and that's our position. Is that while there may  
12 have been an error in judgment, while there may have been  
13 negligence here, it wasn't gross negligence or certainly not  
14 recklessness warranting extradition, and that's the  
15 government's proof here on a prima facie level.

16 THE COURT: Let me ask both of you this. I mean the  
17 problem of course always with mens rea is that, you know,  
18 we're unable to scientifically prove mens rea. I mean, we  
19 can't -- and I'm sure as a defense counsel at trial you're  
20 often up there, you know, saying -- as the prosecutor  
21 probably is saying to the jury that, you know, during the  
22 entire trial I'm not going to be able to by some surgical  
23 method extract that area of the person's brain that says they  
24 knew or didn't know.

25 It normally does depend upon circumstances. It depends

1 on credibility, things that I am not entitled to weigh here.  
2 How believable the witnesses are or aren't when they actually  
3 tell their story in front of people who can understand that.  
4 My decision is to decide whether or not based upon the  
5 evidence that's here there's probable cause to believe that  
6 that standard has been reached, not whether it in fact has  
7 been reached.

8 And so I guess my question to you in that respect is  
9 that everyone agrees that all I can depend upon here is what  
10 the affidavits have. I understand that your position is that  
11 we should be required to depend upon more. The government  
12 should be required to call live witnesses, and ultimately  
13 we'll address that issue in our decision in the case.

14 But assuming I don't agree with that, or I think that  
15 the law is different than that, that the law does in fact --  
16 it's really the kind of the totality of all of the  
17 affidavits. I've looked at them thoroughly. I've looked at  
18 them when I was making a different decision. And that was  
19 the decision as to whether bail would be appropriate. And  
20 that to me was a different standard than presently when I  
21 look at it, and I'll look at them again before I make my  
22 decision in this case.

23 But it really comes down to -- it sounds to me you're  
24 both in agreement -- this issue of whether or not there is  
25 probable cause in your case based upon the submitted

1 affidavits and in your case, since there is no other evidence  
2 that's been presented, unless you're legally correct and  
3 they're wrong, and I make that decision in what they can't  
4 submit, then it's based upon what's in those affidavits.

5 And my decision, as I said, is not to decide whether  
6 there is or is not recklessness, but whether there is or is  
7 not probable cause to believe that there's recklessness that  
8 a jury should decide later on. Is that your understanding  
9 then of what it is that I need to do?

10 MR. ACKOUREY: I would agree with that assessment.

11 MR. FISANICK: Absolutely correct, your Honor.

12 THE COURT: All right. Okay. I don't know that I have  
13 any other questions. I apologize for interrupting both of  
14 you during the course of your presentations to ask questions,  
15 but I wanted to just flush out a bit. But is there anything  
16 else that the government -- it's your burden -- that you want  
17 to mention now that we're -- or Mr. Ackourey, I assume that  
18 you are done with your presentation?

19 MR. FISANICK: I am.

20 THE COURT: Is there anything else, Mr. Fisanick, you  
21 want to mention?

22 MR. FISANICK: Yes. There's one other matter, which is  
23 your Honor, if this Court feels that it's not going to be  
24 able to find extraditability on this offense the case law  
25 permits the filing of supplemental briefing documents and

1 other evidence from a foreign government. So the Government,  
2 on behalf of the Government of Canada, I would request the  
3 right, if this Court issues an order not extraditing to allow  
4 proceedings to be re-opened so the foreign government could  
5 submit supplemental information.

6 THE COURT: Mr. Ackourey.

7 MR. ACKOUREY: Judge, I just think it's premature at  
8 this stage.

9 THE COURT: Well, I think it's almost more than  
10 premature, and here's my concern, is that the government can  
11 submit whatever it is that you wish to submit. No one has  
12 stopped the government, for example, in the time between your  
13 original submissions to us and now from submitting under the  
14 appropriate standards whatever additional matter you thought  
15 needed to be submitted to Canada.

16 MR. FISANICK: But I guess, Your Honor, if I may  
17 interject --

18 THE COURT: Not yet --

19 MR. FISANICK: I'm sorry.

20 THE COURT: -- but then you can. Let me finish what I  
21 have to say and then you can. You know, the government --  
22 the burden is on you. You need to submit your documentation,  
23 and you did submit documentation. The documentation of  
24 course has a number of hoops that it needs to go through. It  
25 isn't a question merely of kind of gathering documentation.



1 It needs to be submitted through two state departments and  
2 then ultimately get certified and then come here. You  
3 certainly had that opportunity. And even from when the  
4 government first received this case, which my guess would be  
5 it's probably a year ago. How long ago was it that the State  
6 Department received the request from Canada?

7 MR. FISANICK: That I don't know. I know my office has  
8 received it less than six months ago.

9 THE COURT: Okay. But I would assume that the State  
10 Department had it a good bit of the time before you. My  
11 recollection of dealing with the Office of International  
12 Affairs in the State Department was that -- I could be wrong  
13 -- but my guess is it's been a good year that they had the  
14 case. I only say that in that you have an opportunity to  
15 submit whatever you want, and I agree that you're entitled to  
16 submit whatever you want, but the Court -- it would be  
17 foolish to expect that the Court should now be making a  
18 decision of oh, well, if we agree with the defendant's  
19 position we can't do that, we have to give the government  
20 more time to argue something else when they had time to argue  
21 that in the first place. So I don't think that I see that as  
22 being an appropriate option.

23 MR. FISANICK: Now may I speak, your Honor?

24 THE COURT: Yeah.

25 MR. FISANICK: No. I direct that option to this: If

1 you agree with the defense's position that hearsay by itself  
2 cannot support an extradition, we want to reserve the right  
3 if the Canadian Government so chooses to send the detectives  
4 down here. And that issue would not have arisen but for your  
5 ruling.

6 THE COURT: Okay. And then that -- that's a different  
7 issue. And on that issue I would consider that, since if I  
8 did decide in that way, it strikes me that that would be an  
9 issue of first impression, since I haven't been able to find  
10 any cases that have ruled in that regard. And so in that  
11 circumstance it would seem to make sense to allow counsel,  
12 since they couldn't reasonably have been aware that that  
13 would be a ruling in a case, since I haven't found any case  
14 law that has done that. So if that were to happen I would  
15 consider whether or not it would be appropriate to reopen the  
16 hearing or allow further submission. Anything else?

17 MR. FISANICK: Nothing else, your Honor.

18 THE COURT: Mr. Ackourey?

19 MR. ACKOUREY: Nothing further, Judge.

20 THE COURT: Okay. I'm going to take the matter under  
21 advisement. I'm going to continue Ms. Harshbarger in the  
22 same conditions as was previously set. I always hate to set  
23 very specific limits, but it is my intention to come to a  
24 conclusion on this case relatively expeditiously. And so I'm  
25 hoping that you will hear from me in the reasonable future.

1 That doesn't mean it's going to be Monday, it's not. But  
2 I'll need some time to go through what's been said today,  
3 review some of the case law and probably take a look at the  
4 transcript of the proceeding. And I'm just indicating that I  
5 do want a copy of the transcript of the proceeding as soon as  
6 reasonably possible. And then shortly after that we'll come  
7 to a conclusion. Thank you very much.

8 (BRIEF RECESS TAKEN.)

9 THE COURT: One last thing before counsel goes.

10 MR. FISANICK: Yes, your Honor.

11 THE COURT: And that is in the event that we do decide  
12 on extradition, and I'm not saying that we will, but if I  
13 make that decision I noticed that in the forms that I have  
14 there are multiple different types of forms that are  
15 submitted by the government. So I would ask that the  
16 government and the defense counsel get together and agree on  
17 what would be -- or submit proposed forms that order the  
18 extradition if that circumstance occurs. All right.

19 MR. FISANICK: Can we wait until if you order  
20 extradition?

21 THE COURT: I assume that it's a form order that you've  
22 got, that it's a most recent one?

23 MR. FISANICK: I think I submitted that. I may not  
24 have, but we will when we get the order, assuming you order  
25 extradition.

1 THE COURT: We can do that. What we'll do then, we'll  
2 make a decision on the case and if we make that order we'll  
3 give the parties time to submit to us an appropriate order  
4 that would accommodate that.

5 MR. FISANICK: Very well, your Honor.

6 THE COURT: I don't want to make any misunderstanding,  
7 by the way. I have not decided this case.

8 (12:17 p.m., court adjourned.)

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